STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 13, 2006
v	No. 258930 Grand Traverse Circuit Court
KEVIN T. PARMENTER, Defendant-Appellant.	LC No. 04-009385-FH

Before: Smolenski, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of third-degree fleeing and eluding a police officer, MCL 257.602a(3). Defendant was sentenced to a term of 36 months' probation, with the first six months in jail. On appeal, defendant argues he was denied effective assistance of counsel because his trial attorney failed to investigate and preserve the affirmative defenses of insanity and duress. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On January 11, 2004, Grand Traverse County Deputy Sheriff Kenneth Chubb observed defendant speeding and running a red light in a pickup truck. The officer pursued defendant with his overhead lights activated. After traveling approximately two miles at speeds reaching 80 to 85 miles per hour, defendant finally stopped his truck. Deputy Chubb exited his patrol car, drew his weapon, and approached the driver's side of the pickup truck while ordering defendant to place his hands outside the vehicle. When Deputy Chubb asked defendant to turn off his engine, defendant placed his hands back inside the vehicle, put the vehicle into gear and sped off. A chase ensued during which defendant reached speeds in excess of 80 miles per hour, disregarded several red lights, and eventually began traveling the wrong way on US 131. The Michigan State Police joined Deputy Chubb in the effort to apprehend defendant. The chase ultimately ended when defendant collided into the rear end of a State Police car. Prior to trial, defendant was referred to the Center of Forensic Psychiatry for a competency and criminal responsibility evaluation. The evaluating psychologist concluded that defendant was competent to stand trial and that defendant did not meet the criteria for the legal defense of insanity.

Generally, a defendant claiming ineffective assistance of trial counsel must move for a new trial or file a motion to remand the case for an evidentiary hearing to preserve the issue for review. *People v Bero,* 168 Mich App 545, 554; 425 NW2d 138 (1988); *People v Juarez,* 158

Mich App 66, 73; 404 NW2d 222 (1987). Where, as here, no such motions were made, defendant's claims of error must find support in the existing trial court record. *Bero, supra,* 554.

Ineffective assistance of counsel is a mixed question of law and fact. *People v Riley,* 468 Mich 135, 139; 659 NW2d 611 (2003). The factual findings of the trial court are reviewed under a clear error standard, while its legal or constitutional conclusions are reviewed de novo. *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002).

Trial counsel is presumed to have provided effective legal representation to the defendant, and the defendant bears a heavy burden to show otherwise. *LeBlanc, supra,* 578; *People v Solmonson,* 261 Mich App 657, 663; 683 NW2d 761 (2004). To overcome the presumption of effective assistance, defendant generally must offer evidence both that counsel failed to render adequate legal assistance, and that counsel's poor representation so prejudiced the defendant as to deprive him of a fair trial. *United States v Cronic,* 466 US 648, 658; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *Strickland v Washington,* 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma,* 462 Mich 281, 302; 613 NW2d 694 (2000); *People v Mack,* 265 Mich App 122, 129; 695 NW2d 342 (2005).

Defendant was given the opportunity to address the court regarding his concerns about the adequacy of his legal representation prior to the start of trial. Defendant's complaints included allegations that defense counsel had discussed "specific facts" relating to defendant's case with the prosecutor and with police officers, and that defense counsel had been "asking other prosecutors and officers their opinions in my case for him to be able to put up some kind of defense." Several things are notable regarding the remarks made by defendant about the quality of his representation. First, defendant did not express any concerns about defense counsel's failure to pursue or preserve defenses of insanity or duress. On the contrary, one of defendant's last-mentioned complaints was that defense counsel "has, you know, continued to go for an insanity plea." Second, they reveal that defense counsel was actively engaged in trial preparation by interviewing witnesses, having discussions or plea negotiations with the prosecutor, and investigating possible defenses. Finally, they confirm that once the insanity defense was abandoned, defense counsel repeatedly discussed with defendant his concern that defendant did not have a meritorious defense.

The right to counsel guaranteed by the United States and Michigan Constitutions encompasses a right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, sec 20; *Cronic, supra,* 466 US at 654; *People v Pubrat,* 451 Mich 589, 594; 548 NW2d 595 (1996); *In re CR,* 250 Mich App 185, 197; 646 NW2d 506 (2002). A defense attorney's failure to reasonably investigate or proffer a substantive defense may, under proper circumstances, constitute ineffective assistance of counsel. *People v McVay,* 135 Mich App 617, 618-619; 354 NW2d 281 (1984); *People v Moore,* 131 Mich App 416, 418; 345 NW2d 710 (1984). However, the court's review in this regard is highly deferential. *Kimmelman v Morrison,* 477 US 365, 381; 106 S Ct 2574; 91 L Ed 2d 305 (1986). A reviewing court is generally reluctant to substitute its own judgment for that of trial counsel in matters of defense strategy, *People v Strong,* 143 Mich App 442, 449; 372 NW2d 335 (1985); *People v Sealy,* 136 Mich App 168, 176; 356 NW2d 614 (1984), and need not determine whether the trial strategy pursued by defense counsel was the best means of presenting a defense. *People v Martin,* 210 Mich 139, 141; 177 NW 193 (1920). A difference of opinion regarding trial strategy does not amount to ineffective assistance of counsel. *Sealy, supra,* 176. A criminal defendant is denied effective assistance of counsel only

where his attorney fails to properly pursue a meritorious defense. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003); *Mack, supra*, 130.

There is no evidence in the trial court record to support the conclusion that the insanity defense would have been meritorious under the facts of this case. The claim of insanity is an affirmative defense requiring proof that, at the time of the offense and as a result of mental illness or mental retardation, the defendant lacked the "substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity." MCL 768.21a. Defendant has the burden of proving the defense of insanity by a preponderance of the evidence. MCL 768.21a(1), MCL 768.21a(3); *People v Mette*, 243 Mich App 318, 326 n 4; 621 NW2d 713 (2000). Given the criteria a defendant must satisfy to qualify for acquittal on this basis, defense counsel's decision to abandon the defense in the instant case is easily viewed as sound trial strategy considering that the state's forensic psychologist had opined that defendant was not insane at the time of the offense and where defendant, who was deemed competent, shared the psychologist's view. The record contains no information that would suggest that an insanity defense could have succeeded.

A trial counsel's failure to adequately prepare and present an insanity defense may, under certain circumstances, deprive a defendant of the effective assistance of counsel. *People v Bryant*, 77 Mich App 108, 110; 258 NW2d 162 (1977). In the instant case, however, defense counsel did arrange for defendant to undergo a forensic psychiatric evaluation and defendant was found competent to stand trial.

Defendant's second argument—that he was deprived of the effective assistance of counsel by virtue of the fact that his lawyer did not pursue a defense of duress—is also without merit. Defendant argues that he suffers from mental illnesses that may have caused him to experience "suspiciousness" and "paranoid ideation" during the traffic stop, that these fears may have been what caused him to flee, and that if defense counsel had presented such evidence to the jury it might have supported a defense of duress. The question thus presented is whether the subjective, unreasonable fear of defendant, caused by paranoia and suspiciousness stemming from mental illness, can constitute the affirmative defense of duress. Under well established case law, the answer is "no."

The duress defense would have failed in this case for a number of reasons. First, "[t]o establish a duress defense, defendants must show, among other elements, that they faced threatening conduct of sufficient magnitude to create fear of death or serious injury in the minds of reasonable persons." *People v Gimotty*, 216 Mich App 254, 257; 549 NW2d 39 (1996). See also *People v Terry*, 224 Mich App 447, 453; 569 NW2d 641 (1997). This argument would have been blatantly inconsistent with defendant's proffered explanation for his conduct; namely, that he suffered from paranoid (i.e., irrational) fear as a result of mental illness. In advancing this theory, defendant effectively concedes that reasonable persons who are willing and able to obey the commands of police officers do not fear that death or serious injury will result from a traffic stop.

Furthermore, to pursue the defense of duress, defendant would have been required to show that his own negligent conduct was not the cause of the circumstances. *People v Merhige*, 212 Mich 601, 611; 180 NW 418 (1920); *Terry, supra*, 453. In the case at bar, the evidence

would have shown that the circumstances giving rise to defendant's alleged fear were, in fact, the result of his own negligent conduct (i.e., driving at an excessive speed, running through a red light at an intersection, and failing to pull over or even to slow down in an appropriate amount of time when Deputy Chubb first attempted to pull him over). Ineffective assistance of counsel cannot be predicated on the failure to advocate a frivolous or meritless position. *Riley, supra,* 142; *Mack, supra,* 130. Since the defense of duress would have been unavailable to defendant under the facts as he recites them, it was entirely reasonable for defense counsel to not pursue or offer this defense.

Affirmed.

/s/ Michael R. Smolenski
/s/ Donald S. Owens
/s/ Pat M. Donofrio